STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM BUSHY,

Plaintiff-Appellant,

and

GERALD NAGTZAAM and ROBERT HAWKES,

Plaintiffs,

v

ROBERT L. BERACY and GRATIOT COUNTY BOARD OF COMMISSIONERS,

Defendants-Appellees.

UNPUBLISHED
February 16, 2006

No. 262909
Gratiot Circuit Court
LC No. 01-070212-CL

Before: Talbot, P.J., and White and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's orders dismissing his political discrimination, retaliation, constructive discharge and malicious breach of duty claims against defendants in this employment case. We affirm in part and reverse in part.

William Bushy, a Detective Sergeant in the Gratiot County Sheriff's Department, ran for Sheriff against defendant Robert L. Beracy, the incumbent Sheriff, in the August 8, 2000 primary election for the Republican nomination. Plaintiff took two months of vacation time in the summer of 2000 to campaign for the primary election. During that time, a supporter of defendant Beracy was selected to fill plaintiff's position. Defendant Beracy won the Republican primary. Plaintiff contends that immediately after the primary election, he was not permitted to return to his Detective Sergeant assignment despite a long-standing departmental practice allowing officers to return to their assignments after using vacation time; that he was reassigned to a road patrol capacity; and that his campaign manager, former plaintiff Robert Hawkes, was discharged and replaced by a supporter of defendant Beracy.

Plaintiff filed a grievance under the governing collective bargaining agreement (cba), challenging defendant's authority to demote him from the rank of Detective Sergeant to road patrol Sergeant. After a hearing, the arbitrator concluded that defendant Beracy had the authority to transfer plaintiff under the cba, and found that plaintiff's transfer was not a demotion. As

noted in the arbitrator's decision, the parties stipulated that plaintiff did not waive any rights under state or federal statutes by arbitrating, and the arbitrator's opinion expressly states that the issue whether plaintiff's transfer was discriminatory or violated civil rights was not addressed in the arbitration. The arbitrator found in pertinent part:

> The issue then becomes whether or not the collective bargaining agreement provides the Sheriff with the unilateral right to transfer road sergeants to the Detective Bureau and at the same transfer detective sergeants to the road patrol as a road patrol supervisor in the sergeant classification.
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> This Arbitrator dismissed the Union's position that the transfer of Detective Sergeant William Bushy to the Road Patrol on the afternoon shift as of August 10, 2000 constituted a demotion. The contract provides that, as long as Detective Sergeant Bushy is in the Detective Bureau, he will be given a five-hundred ($500.00) dollar clothing allowance, in lieu of the standard uniforms. The Arbitrator does not read the five-hundred ($500.00) dollar uniform allowance as a form of additional compensation for being assigned to the Detective Bureau. To the contrary, this is to treat road patrol sergeants and detective sergeants on an equal basis, in accordance with the uniform provisions of the collective bargaining agreement, in that the County furnishes uniforms to the road patrol sergeants and they maintain those uniforms on behalf of the uniformed road patrol sergeants. The detective sergeants are required to wear their own clothing and, based upon the nature of their work and the fact that the Department has the right to regulate their appearance, the parties recognized, by way of the collective bargaining agreement, that sergeants assigned to the Detective Bureau, holding the classification of detective sergeant should not have to bear the costs of maintaining their required clothing as part of their personal expenses.
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> A review of the collective bargaining agreement leads this Arbitrator to conclude that, under the provisions of Article 22 (Rights of the Sheriff), the Sheriff had the right, absent any discriminatory intent as set forth under the collective bargaining agreement in Article 18,[1] to transfer detective sergeants to the road patrol and to transfer road patrol sergeants to the Detective Bureau.
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> The parties stipulated, during the course of the Arbitration Hearing, that this Arbitrator's decision, as it relates to whether or not the Sheriff had the right under the collective bargaining agreement to transfer Detective Sergeant Bushy to the position of Road Patrol Sergeant, would not be decided upon the provisions of Article 18 and therefore, Sgt. Bushy has not waived any rights he may otherwise have under any state or federal statute.

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[1] Article 18, section 1, of the cba states in pertinent part: "All parties agree not to discriminate against any Employee because of race, creed . . . or political or religious beliefs."

Nor did this Arbitrator make any ruling as to the motives underlying the Sheriff's determination to transfer Sgt. Bushy, as this Arbitrator has determined that the contract, in pertinent parts, is silent as to whether or not the parties have negotiated to create the classification of detective sergeant, which would otherwise elevate it to special status for the purpose of transferring out of the Detective Bureau and into a road patrol supervisor's position. This Arbitrator has specifically ruled that the contract, pursuant to Article 22, vests the Sheriff with the right to make such a transfer. Further, this Arbitrator rejects any justification offered by the Sheriff during the course of the Hearing as to why Det. Sgt. Bushy was transferred, the Sheriff indicated that his decision was based upon feedback from the State Police. This is pure hearsay, and this Arbitrator rejects any such evidence as being the basis for the transfer. This Arbitrator further points out that he was a Detective in the Wayne County Sheriff's Department for over fifteen (15) years and that criticism from the Michigan State Police as to Sheriff's Departments' investigations is not uncommon.

In light of the fact that this transfer/demotion is a matter of a first impression between the parties, and that there is no arbitrable history between the parties, this Arbitrator must then fashion an award which he believes constitutes the intent of the parties.

V. **AWARD OF THE ARBITRATOR**

(1) This Arbitrator finds that, pursuant to Article 22 of the collective bargaining agreement, the Sheriff, in exercising his authority under the contract and not pursuant to State law, had the right to transfer Detective Sergeant William Bushy to the position of Road Patrol Sergeant as of August 10, 2000.

(2) Because this is the first time that the parties have submitted this issue to arbitration, it is logical to expect that Detective Sergeant Bushy had relied upon the provision of the collective bargaining agreement which provided for a five-hundred ($500.00) dollar clothing allowance in making decisions as to the purchase of clothing which would conform to the standards set forth by the Sheriff's Department. As a matter of equity and to ensure that Sergeant Bushy will not be placed in a position of having to pay for clothing items which he anticipated would be worn in the future, this Arbitrator orders the County to pay Sergeant Bushy a one time only clothing allowance in the amount of Two Hundred Fifty and 00/100 ($250.00) Dollars.

(3) As to any hardship associated with losing a Departmental automobile, this Arbitrator finds that the automobile was issued to Sgt. Bushy for the benefit of the Department and not for his personal benefit and therefore, he has not suffered any damages or loss of income as a result of the loss of a Departmental automobile.

After the arbitration concluded, plaintiff[2] filed the instant suit in circuit court, alleging political discrimination in violation of Article I, § 5 of the Michigan Constitution and the federal constitution's First Amendment (which prohibit government officials from making employment decisions based on an employee's beliefs, affiliation or support), retaliation, and constructive discharge. As to defendant Gratiot County Board of Commissioners (Board), plaintiff alleged that the Board maliciously breached its duties by failing to exercise control and supervision over defendant Beracy, allowing him to alter plaintiff's conditions of employment. Defendants moved for summary disposition, asserting that plaintiff's claims of First Amendment political discrimination and retaliation failed as a matter of law because an adverse employment action is a requisite element of those claims, and the arbitrator found that no adverse employment action occurred (thus collateral estoppel precluded plaintiff's reasserting that issue in this civil suit); that plaintiff's constructive discharge claim failed as a matter of law because he failed to exhaust administrative remedies under the cba, among other reasons; and that plaintiff's claim of malicious breach of duty against defendant Board failed to state a claim on which relief could be granted. The circuit court granted defendants summary disposition.

I

Plaintiff asserts that he stated causes of action for political discrimination and retaliation for exercising his freedom of speech. He argues that his claims of violations of his First Amendment guarantees are separate and distinct from his employment claims. Plaintiff contends that the arbitrator's finding that he was not demoted is not fatal to these claims, and that he is not collaterally estopped from litigating his constitutional claims because he seeks to litigate, for the first time, the actual intent and the manner by which his alleged "transfer" occurred. Plaintiff contends that the issues of intent and political retaliation were not "actually and necessarily determined" in the arbitration.

This Court reviews the circuit court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The circuit court agreed with defendants that plaintiff's claims of political discrimination and retaliation fail as a matter of law because plaintiff is unable to establish one of the requisite elements for those claims--that he suffered an adverse employment action. We disagree.

A

Defendants are correct that claims of discrimination based on political beliefs or affiliation require an adverse employment action. See, e.g., *Feick v Monroe Co*, 229 Mich App 335, 341-342; 582 NW2d 207 (1998):

> A dismissal or other adverse employment action toward a public employee based solely on the employee's private political beliefs or affiliation

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[2] Plaintiff Bushy and two other plaintiffs brought the instant suit. The parties stipulated to dismiss former plaintiff Robert Hawkes' case, and the remaining former plaintiff, Gerald Nagtzaam, is not a party to this appeal.

> presumptively violates the First Amendment. *Branti v Finkel*, 445 US 507, 515-517; 100 S Ct 1287; 63 L Ed 2d 574 (1980); *Rutan v Republican Party of Illinois*, 497 US 62, 65, 71-73, 75; 110 S Ct 2729; 111 L Ed 2d 52 (1990) (noting that promotions, transfers, and recalls after layoffs of lower-level public employees based on political affiliation or support impermissibly infringe their First Amendment rights). However, political affiliation may be an acceptable requirement for some types of employment. *Branti, supra* at 517-518; *Hall v Tollett*, 128 F3d 418, 422 (CA 6, 1997).
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> The term "political affiliation" includes not only partisan political interests and concerns, but also beliefs and commitments. *Monks v Marlinga*, 732 F Supp 749, 753, n 2 (ED Mich, 1990), aff'd 923 F2d 423 (CA 6, 1991). . . . The United States Court of Appeals for the Sixth Circuit in *McCloud v Testa*, 97 F3d 1536, 1553 (CA 6, 1996), held that First Amendment protection from adverse patronage employment actions extends to nonideological political factions of the same party. See also *Monks, supra* at 753, n 2.
>
> To determine whether political considerations are appropriate in making personnel decisions for a certain position, courts must examine the inherent duties of that position and the duties that the new holder of that position will perform. *Hall, supra* at 423.

See also, *Farhat v Jopke*, 370 F3d 580, 588 (CA 6, 2004), in which the court stated:

> To establish a prima facie case of First Amendment retaliation under 42 U.S.C. 1983, Appellant must demonstrate that: (1) he was engaged in a constitutionally protected activity; (2) he was subjected to adverse action or deprived of some benefit; and (3) the protected speech was a 'substantial' or 'motivating factor' in the adverse action. *Leary v. Daeschner,* 349 F.3d 888, 897 (6th Cir. 2003) (citations omitted).
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> The framework for analyzing a First Amendment retaliation case is well-established. In *Rodgers v. Banks*, 344 F.3d 587 (6th Cir. 2003), this court recently summarized this analysis:
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> . . . public employees may not be required to sacrifice their First Amendment free speech rights in order to obtain or continue their employment, *Rankin v. McPherson,* 483 U.S. 378, 383, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) (citing *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) . . . [I]n determining whether a public employer has violated the First Amendment by firing a public employee for engaging in speech, the Supreme Court has instructed courts to engage in a three-step inquiry. First, a court must ascertain whether the relevant speech addressed a matter of public concern. *See Connick v. Myers*, 461 U.S. 138, 143, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). If the answer is yes, then the court must balance the interests of the public employee, "as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. Of Educ.*, 391 U.S. 563, 568,

> 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). Finally, the court must determine whether the employee's speech was a substantial or motivating factor in the employer's decision to take the adverse employment action against the employee. *Mt. Healthy City Sch. Dist. Bd. Of Educ. v. Doyle,* 429 U.S. 274, 287, 97 S. Ct. 568, 50 L.Ed.2d 471 (1977); *Perry,* 209 F.3d at 604.
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> *Id.* at 596.

In order to establish an adverse employment action, a plaintiff must show that the action was "materially adverse in that it is more than 'mere inconvenience or an alteration of job responsibilities.'" *Meyer v Center Line,* 242 Mich App 560, 569; 619 NW2d 182 (2000), quoting *Wilcoxon v Minnesota Mining & Mfg Co,* 235 Mich App 347, 364; 597 NW2d 250 (1999).

Plaintiff presented evidence from which a reasonable fact-finder could conclude that the pattern and practice within the department was such that a Detective Sergeant was accorded treatment or privileges not accorded to Road Patrol Sergeants. Plaintiff also presented evidence sufficient to raise a question of fact whether after the election, defendant Beracy refused to permit Bushy to ever again become eligible for the position of Detective Sergeant. For example, plaintiff presented evidence that when Marshall Chase, who was selected to temporarily fill plaintiff's position, left active duty on a workers compensation claim, plaintiff was prohibited by defendant Beracy from returning as a Detective.

B

The next question is whether the arbitrator's finding that plaintiff's transfer to Road Patrol Sergeant did not constitute a demotion collaterally estops plaintiff from asserting the political discrimination and retaliation claims on the basis that his First Amendment rights of free speech were abridged. We conclude that it does not.

> In general, for collateral estoppel to apply three elements must be present:
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> (1) 'a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment'; (2) 'the same parties must have had a full [and fair] opportunity to litigate the issue'; and (3) there must be mutuality of estoppel.' [*Monat v State Farm Ins Co,* 469 Mich 679, 683-684; 677 NW2d 843 (2004), quoting *Storey v Meijer, Inc,* 431 Mich 368, 373 n 3; 429 NW2d 169 (1988).]

Factual findings made during an arbitration proceeding can support application of the doctrine of collateral estoppel. *Cole v West Side Auto Employees Federal Credit Union,* 229 Mich App 639, 645; 583 NW2d 226 (1998); *Fulghum v United Parcel Service, Inc,* 130 Mich App 375, 377; 343 NW2d 559 (1983), aff'd 424 Mich 89, 92; 378 NW2d 472 (1985).

We conclude that although the doctrine would, in fact, apply to issues decided by the arbitrator, the arbitrator did not decide that there was no adverse employment action. Rather, the arbitrator decided that there was no "demotion" within the meaning of the collective bargaining agreement (CBA). The arbitrator's decision explicitly noted that:

> The parties stipulated, during the course of the Arbitration Hearing, that this Arbitrator's decision, as it relates to whether or not the Sheriff had the right under the collective bargaining agreement to transfer Detective Sergeant Bushy to the position of Road Patrol Sergeant, would not be decided upon the provisions of Article 18 and therefore, Sgt. Bushy has not waived any rights he may otherwise have under any state or federal statute.
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> Nor did this Arbitrator make any ruling as to the motives underlying the Sheriff's determination to transfer Sgt. Bushy . . . . Further, this Arbitrator rejects any justification offered by the Sheriff during the course of the Hearing as to why Det. Sgt. Bushy was transferred, the Sheriff indicated that his decision was based upon feedback from the State Police. This is pure hearsay, and this Arbitrator rejects any such evidence as being the basis for the transfer. . . .

The arbitrator's analysis was clearly focused on the question whether the CBA treated the Detective Sergeant position as a classification different from the Road Patrol Sergeant's position, and whether the clothing allowance constituted a pay differential. The determination that under the terms of the CBA the change in assignments was a transfer within the right of Sheriff Beracy to institute without cause, or a demotion subject to a just cause justification, is not dispositive of the question whether there was an "adverse employment action." The arbitrator focused on the sheriff's right to make the decision without just cause. That question depended on whether this was a demotion *under the CBA*. An employment action can be adverse in fact, and not be considered a demotion under the CBA. This does not mean that any employment decision that is slightly adverse is actionable. One must still meet the standards articulated in *Wilcoxon, supra* at 364:

> [I]n order for an employment action to be adverse for purposes of a discrimination action, (1) the action must be materially adverse in that it is more than 'mere inconvenience or an alteration of job responsibilities,' *Crady* [*v Liberty Nat'l Bank & Trust Co,* 993 F2d 132, 136 (CA 7, 1993)], and (2) that the change is adverse because "a plaintiff's 'subjective impressions as to the desirability of one position over another' [are] not controlling," *Koscis* [*v Multi-Care Mgt, Inc,* 97 F2d 876, 886 (CA 6, 1996)], quoting *Kelleher v Flawn,* 761 F2d 1079, 1986 (CA 5, 1985).

This inquiry is, however, separate from the question whether plaintiff is collaterally estopped by the arbitrator's ruling. We conclude that the circuit court erred in applying the doctrine of collateral estoppel to preclude plaintiff's constitutional claims.

II

Plaintiff also challenges the dismissal of his constructive discharge claim. A constructive discharge occurs when an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation. See *Hammond v United of Oakland, Inc,* 193 Mich App 146, 151; 483 NW2d 652 (1992). The circuit court concluded that an adverse employment action is a requisite element of a constructive discharge claim, as it is for retaliation and discrimination claims. We conclude plaintiff's claim was properly dismissed, but for the reason that plaintiff failed to pursue his remedies under the cba.

In *Mollett v Taylor*, 197 Mich App 328; 494 NW2d 832 (1992), a former firefighter filed a constructive discharge claim without pursuing administrative remedies available to him under the governing cba or under the police and fire civil service act, MCL 38.501 *et seq.* The plaintiff alleged violations of his federal constitutional due process rights. The *Mollett* Court noted that the "plaintiff's constructive discharge claim appears to be an arbitrable issue, because plaintiff made a claim that on its face was governed by the collective bargaining agreement." 197 Mich App at 340-341. The *Mollett* Court concluded:

> We hold that a constructive discharge of a public employee based on considerations other than those that give rise to a statutorily created and separate cause of action is to be treated no differently than an actual discharge that would require recourse to the civil service commission or the collective bargaining agreement. [*Id.* at 342-343.]

In the instant case, plaintiff's constructive discharge claim appears on its face to be governed by the cba[3]. Plaintiff's constructive discharge claim did not assert violation of a statutory right,[4] such as under the Civil Rights Act, in which event it would not have been necessary for him to exhaust his remedies under the cba. Plaintiff also asserted that harassment led to his constructive discharge, but plaintiff does not assert violation of a statutory right, such as under the Civil Rights Act, and we have found no authority supporting a claim of harassment absent violation of a statutory right. We conclude that plaintiff's constructive discharge claim was properly dismissed.

III

Regarding his claim of malicious breach of duty, plaintiff asserts that the Board is not entitled to governmental immunity where plaintiff alleges that the state violatedp

a right conferred by the Michigan Constitution. Plaintiff maintains that the Civil Rights Act authorized civil suits for damages for the denial of rights, and governmental immunity is not a defense to such claims against governmental agencies.

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[3] Plaintiff in the instant case does not dispute that the cba covers constructive discharge. The cba in the instant case, Article 9, § 1, provides:

> Procedures for any Employee having a grievance arising as to the application, interpretation, conditions of employment of this Agreement, discipline, suspension or *discharge* as herein set forth, shall be as follows: each grievance shall be put in writing and submitted to the Sheriff or his/her designee within five working days from the occurrence, said grievance to be answered in writing by the Sheriff within five working days. [Emphasis added.]

[4] Plaintiff's amended complaint included an age discrimination claim, but that claim is not pursued on appeal.

Plaintiff cited no legal authority below to support the existence of a claim for malicious breach of duty, nor have we found any. To properly present an issue for appeal, an appellant's argument must be supported by citation to appropriate authority. MCR 7.212(C)(7). Failure to properly address the merits of an assertion of error constitutes abandonment of the issue. *Yee v Shiawassee County Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Under these circumstances, and because the question whether a legal duty is owed is one of law, the circuit court could properly dismiss plaintiff's malicious breach of duty claim.

We affirm the dismissal of plaintiff's constructive discharge and malicious breach of duty claims. We reverse the dismissal of plaintiff's political discrimination and retaliation claims. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Helene N. White
/s/ Kurtis T. Wilder